

STATE OF VERMONT

SUPERIOR COURT
Rutland Unit

CIVIL DIVISION
Docket No. 414-6-09 Rdev

EDWARD E. DUMAS, II,
Plaintiff

ORIGINAL PAPER
VERMONT SUPERIOR COURT

v.

JUL 27 2010

KEVIN COLEMAN and VERMONT
LEAGUE OF CITIES AND TOWNS
PROPERTY AND CASUALTY
INTERMUNICIPAL FUND,
Defendants

RUTLAND

DECISION ON DEFENDANT'S MOTION TO DISMISS, FILED JUNE 9, 2010

This case is about allegedly defamatory statements made by defendant Kevin Coleman, a City of Rutland Alderman, following the City's settlement of an improper-taser-deployment lawsuit against the City and police officer Edward Dumas. Plaintiff Dumas brings claims against defendant Coleman for libel and slander (defamation), violation of due process, and bad faith.

In May 2010, the plaintiff filed an amended complaint, adding the Vermont League of Cities and Towns Property and Casualty Intermunicipal Fund (VLCT PACIF) as a defendant. The plaintiff alleges breach of fiduciary obligation and breach of contract against VLCT PACIF arising out of its defense of defendant Coleman in the current suit. Defendant VLCT PACIF now moves for dismissal of the claims on the basis of improper joinder, V.R.C.P. 21, and failure to state a claim upon which relief may be granted, V.R.C.P. 12(b)(6).

Plaintiff Edward Dumas is represented by John Paul Faignant, Esq. Defendant

VLCT PACIF is represented by Shapleigh Smith, Jr., Esq.

BACKGROUND

Plaintiff Edward Dumas is a full time police officer for the City of Rutland. Defendant Kevin Coleman is a member of the City of Rutland Board of Alderman.

In 2008, the City of Rutland and Mr. Dumas were parties to a lawsuit alleging improper taser deployment by Mr. Dumas, resulting in alleged civil rights violations (*Griffin v. City of Rutland, et al*). The City of Rutland and Mr. Dumas were represented by counsel paid for by VLCT PACIF, the City of Rutland's insurer. Mr. Dumas alleges that there was no merit to the *Griffin* claim.

The plaintiff in *Griffin* offered to settle for \$10,000. Mr. Dumas objected to any money being paid in his name, and he was dismissed from the lawsuit without any payment being made on his behalf. Mr. Dumas alleges that VLCT PACIF, not the City of Rutland, settled for \$10,000 in order to save it the much higher cost of winning the case at trial.

Mr. Dumas alleges that City of Rutland Alderman Kevin Coleman was privy to all information involving settlement of the *Griffin* taser claim. According to Mr. Dumas, Mr. Coleman knew that Mr. Dumas had been completely exonerated from any wrongful act. Mr. Coleman knew the settlement was funded by VLCT PACIF, not the City, to save the insurance company the much higher cost of winning the case in court.

Mr. Dumas alleges that despite Mr. Coleman's knowledge of the *Griffin* case, Mr. Coleman falsely stated that the *Griffin* case involved unprofessional police conduct, and that the settlement payment was made by the City because the defense was not open and shut. Mr. Dumas alleges that Mr. Coleman knew at the time he made the statements,

which were subsequently published, that they were false and would injure the reputation of Mr. Dumas. Mr. Dumas alleges that Mr. Coleman acted with malice.

As part of Mr. Dumas's defamation case, he sought discovery of the VLCT PACIF file in the *Griffin* matter and knowledge of the *Griffin* case by the adjuster. On December 16, 2009, the Court granted VLCT PACIF's motion to quash the subpoena. The Court found that there was no showing that the VLCT PACIF's *Griffin* file or the knowledge of the adjuster played any part in Mr. Coleman's actions.

In May 2010, Mr. Dumas added VLCT PACIF as a defendant in this case. VLCT PACIF was the insurance company which provided the defense for the City and Mr. Dumas in the *Griffin* case. Because it provides coverage for municipalities and their employees, it is also providing a defense to the defendant in the current case, Alderman Kevin Coleman.

Mr. Dumas alleges that because VLCT PACIF controlled the defense of the *Griffin* case, it forever owes a fiduciary obligation to Mr. Dumas regarding all information and matters concerning that case. Mr. Dumas alleges that VLCT PACIF has breached its fiduciary and good faith duties in three ways. First, VLCT PACIF refuses to give Mr. Dumas access to his file and the adjuster from the *Griffin* case. Second, VLCT PACIF directed separate attorneys representing separate insureds (Mr. Dumas in *Griffin* and Mr. Coleman in the current matter) to report to the same file handler at VLCT PACIF. And third, VLCT PACIF intentionally accessed confidential attorney-client information developed in the *Griffin* matter for use in the defense of Mr. Coleman in the current matter.

Mr. Dumas also alleges breach of contract by VLCT PACIF because it cancelled

a scheduled mediation in the current matter. Mr. Dumas alleges that he has been damaged by this cancellation and by the alleged breaches of fiduciary duty. Although it is not entirely clear from the amended complaint what damages Mr. Dumas seeks against VLCT PACIF, the amended complaint does state that he seeks judgment to be determined by a jury, attorney fees, costs, and punitive damages.

DISCUSSION

A plaintiff seeking to obtain joinder of a defendant must fit within V.R.C.P. 20, which provides that all persons may be joined in one action as defendants if the claims asserted against them arise “out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action” V.R.C.P. 20(a). The rule is nearly identical to Federal Rule of Civil Procedure 20. *Breslauer v. Fayston School Dist.*, 163 Vt. 416, 427 (1995) (citing V.R.C.P. 20 Reporter’s Notes).

“The rule must be liberally construed to facilitate joinder of actions and parties whenever possible.” *Breslauer*, 163 Vt. at 427. “[T]he philosophy of Rule 20(a) is to allow virtually unlimited joinder at the pleading stage.” *Id.* (quoting 7 Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 1660) (internal quotations omitted). Nevertheless, “the trial court has discretion in administering the rule to ensure fairness to all of the potential parties.” *Breslauer*, 163 Vt. at 428. And, “[a]lthough the rule implements a general policy of liberal disclosure, this result is not necessarily the fairest and most efficient in every case.” *Id.*; see also 7 Wright, Miller & Kane, *Federal Practice and Procedure: Civil 3d* § 1652 (court has discretion to deny joinder if it determines that the addition of the party under Rule 20 will not foster the objectives of the rule, but will

result in prejudice, expense or delay).

Joinder of parties under Rule 20(a) is not unlimited and the Court's failure to find that the claims involving proposed parties arise out of a common transaction or that a common question is presented will result in joinder being denied. 7 Wright, Miller & Kane, supra § 1653. There is no one generalized test for ascertaining whether a particular factual situation constitutes a single transaction or occurrence for purposes of Rule 20. *Id.* Rather, courts seem to have adopted a case-by-case approach. *Id.* The Vermont Supreme Court has held that where multiple wrongs combine to produce a common injury, the various claims arise out of the "same transaction" or "occurrence" or a "series of transactions of occurrences" and have a question of fact "common to all defendants." *Breslauer*, 163 Vt. at 427-28.

Here, the plaintiff's claims against defendant Coleman and defendant VLCT PACIF are not alleged to have produced a common injury. The claims arising out of the alleged defamatory statements by defendant Coleman relate to injuries for damage to the plaintiff's reputation. Plaintiff's claims for breach of fiduciary duty and breach of contract against defendant VLCT PACIF relate to apparently separate injuries regarding improper disclosure of attorney-client information and a failure to mediate. These claims have no bearing on the injury to plaintiff's reputation.

Furthermore, the Court fails to see how the claims involving the proposed defendant VLCT PACIF arise out of the "same transaction" or "occurrence" or a "series of transactions of occurrences" as those involving defendant Coleman. The claims against defendant Coleman are directly attributable to his alleged remarks regarding settlement of the *Griffin* case. On the other hand, the claims against defendant VLCT PACIF concern

alleged disclosure of attorney-client information from the *Griffin* case file to aid the defense of defendant Coleman in the *current* case, and breach of contract for failure to mediate in the *current* case. The occurrence of the alleged defamatory statements by defendant Coleman is confined to his one conversation with a reporter. The claims against VLCT PACIF are based on separate and unrelated occurrences regarding its defense of defendant Coleman. Thus, the claims against VLCT PACIF do not arise out of the same transaction or occurrence as the claims against defendant Coleman.

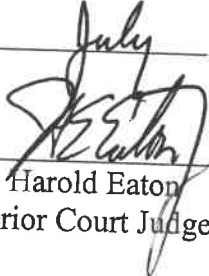
Furthermore, if the plaintiff were allowed to bring these claims against defendant VLCT PACIF, the current case against defendant Coleman would essentially turn into a case within a case. Every action taken VLCT PACIF in providing a defense to defendant Coleman could possibly give rise to another claim by the plaintiff in *this* action. The number of claims that the plaintiff could bring would be potentially limitless. A jury would hear not only about the alleged defamation by defendant Coleman, but also all of the alleged wrongs that occurred while defending that defamation claim. This scenario would be highly prejudicial to the defendants and extremely confusing to the jury. The result would be neither fair nor efficient. See *Breslauer*, 163 Vt. at 428 (although the rule implements a general policy of liberal disclosure, this result is not necessarily the fairest and most efficient in every case).

In conclusion, the claims against VLCT PACIF do not fit within joinder under V.R.C.P. 20. However, under V.R.C.P. 21, misjoinder of parties is not a ground for dismissal. Any claim against VLCT PACIF may be brought in a separate action, where any argument as to failure to state a claim upon which relief may be granted, V.R.C.P. 12(b)(6), would also be more appropriate.

ORDER

- (1) Defendant VLCT PACIF's Motion to Dismiss on the Basis of Improper Joinder under V.R.C.P. 21, filed June 9, 2010, is GRANTED.
- (2) The plaintiff may file its claims against VLCT PACIF in a separate action.
- (3) The defendant VLCT PACIF is not precluded from raising any argument as to failure to state a claim upon which relief may be granted, V.R.C.P. 12(b)(6), in the new action.

Dated at Rutland, Vermont this 27 day of July, 2010.



Hon. Harold Eaton
Superior Court Judge